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Supreme Court, U.S.
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In The
Supreme Court of the United States

ROBIN ALLEN MORRIS,
Petitioner,
v.
FAMILY DOLLAR STORES, INC.,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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August, 2009

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QUESTIONS PRESENTED

I. Would The Family Medical Leave Act cover a situation where there is a possibility of a very serious health condition even though after testing, the condition turns out to be benign.

II. Must there be a temporal proximity between the period of incapacity and the treatment received from a health care provider, both of which are required by 29 C.F.R. 825 of the regulations interpreting The Family Medical Leave Act and can the period be either before or after the condition is diagnosed for there to be a "serious health condition" under the law.

TABLE OF CONTENTS

Questions Presented For Review i

Table of Contents ii

Table of Authorities iii

Opinion Below 1

Jurisdiction 1

Relevant Statutory Provisions 1

Statement 7

Proceedings Below 9

Reasons For Granting the Writ 11

Conclusion 19

TABLE OF AUTHORITIES

Cases

Cheven U.S.A. Inc v. Natural Resources Defense Counsel, Inc., 46 U.S. 837,844 (1984) ... 12

Krenske v. Alexandria Motor Cars, Inc., 289 Fed. Appx 629, 2008 Westlaw, 3849766 (4th Cir. 2008) 17, 18

McDonnell Douglas Corporation v. Green 411 U.S. 792, 92 S. Ct. 1817 (1973) 10

Nevada Department of Human Resources v. Hobbs, 538 U.S. 721 (2003) 12

Price v. City of Fort Wayne, 117 F. 3d 1022, 1024-25 (7th Cir. 1997) 12, 16, 17, 18

Ragsdale v. Wolverine Worldwide, Inc. 535 U.S. 81 (2002) 12

Wysong v. Dow Chemical, 503 50 3d 444, 446 (6th Cir. 2007) 10

Statutes

29 U.S.C. §2601 to 2654 ..... 1, 9

29 U.S.C. §2611(11) 13

29 U.S.C. §2611.11 2

29 U.S.C. §2612(a) 3

29 U.S.C. §2614 3

29 U.S.C. §2654 5

42 U.S.C. 2000 10

Ohio Revised Code Chapter 4112 10

Regulations

29 C.F.R. 825 i

29 C.F.R. 825.11(a)(2) 15

29 C.F.R. 825.114 ..... 5, 18

29 C.F.R. 825.114(b) 15

29 C.F.R. 825.116 7

29 C.F.R. 825.116(a) 15

29 C.F.R. Part 825 5

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 320 Fed. Appx 330, 2009 WL 899 894 (6th Cir. March 31, 2009). (Exhibit B) The opinion of the United States District Court for the Northern District of Ohio was issued on March 21, 2007 and reported at 2007 WL 893051 (N.D. Ohio 2007). (Exhibit C)

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court for the Northern District of Ohio and was pronounced on March 31, 2009. A timely petition for a rehearing en banc was denied on June 1, 2009 (Exhibit A). The Court's mandate was issued on June 17, 2009.

RELEVANT STATUTORY PROVISIONS AND ADMINISTRATIVE REGULATIONS INTERPRETING THE FAMILY MEDICAL LEAVE ACT

A. The Family Medical Leave Act, 29 U.S.C. §2601 to 2654.

1. Definitions

"Serious health conditions" 29 U.S.C. §2611.11

The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves –

(A) inpatient care in a hospital, hospice, or residential medical care facility or;

(B) continuing treatment by a health care provider.

2. Leave Requirements 29 U.S.C. §2612(a)

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee shall

be entitled to a total of 12 workweeks of leave during any 12 month period for one or more of the following:...

(C) In order to care for the spouse, or a son, daughter, or parent of the employee, if such spouse, son, daughter or parent has a serious health condition.

3. Employment and Benefit Protection, 29 U.S.C. §2614

(a) Restoration to position

(1) In general

Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave –

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

4. Regulations, 29 U.S.C. §2654

The Secretary of Labor shall prescribe such regulations as are necessary to carry out subchapter 1 of this chapter and this subchapter not later than 120 after February 5, 2003.

B. Department of Labor Regulations, 29 C.F.R. Part 825

1. What is a "serious health condition" entitling an employee to FMLA leave? 29 C.F.R. 825.114

(a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

(1) ...(Not applicable)

(2) Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(i) A period in incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under order of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which

results in a regimen of continuing treatment under the supervision of the health care provider....

2. What does it mean that an employee is "needed to care for" a family member? 29 C.F.R. 825.116

(a) The medical certification provision that an employee is "needed to care for " a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

STATEMENT

This appeal involves the interpretation of various sections of the Family Medical Leave Act (FMLA) and the accompanying Department of Labor regulations as applied to a very common life situation; a son or daughter is called by a parent for help when facing the possibility of a very serious health condition. In this case, the possibility was cancer but the same situation could arise when facing the possibility of any serious illness. Here, the condition after testing turned out to be benign but the finding should not matter for an eligible employee entitled to leave. He should not have to make the choice of helping a sick family member or risk losing his job.

In this case the Petitioner's mother discovered a lump in her left breast and went to see her personal care physician (PCP) who examined her and ordered a mammogram which showed an abnormality. She thought she had cancer and was understandably anxious and depressed which required her to take

various medications she had not taken before. She then had a biopsy and subsequently learned the growth was benign. After the biopsy, her anxiety continued until she learned of the results but she remained bedridden for at least four days after the surgery, suffering from headaches, stomach problems, dizziness, the results of what she believes was a reaction to the anesthesia. She saw her doctor nine days after the surgery for her post-surgical examination. Her breast continued to bother her for some time and according to what she stated in her affidavit, she went back to the surgeon and her PCP on at least two other occasions.

Shortly after learning of the abnormal mammogram and his mother's need for "surgery", the Petitioner asked for time. His request was granted in the form of vacation time even though his supervisor's assistant confirmed he wanted time off because his mother was ill and having "some type of surgery." Upon his return to work at 4:00 a.m. on November 8, 2004 (his usual starting time), he learned he had been terminated.

PROCEEDINGS BELOW

The Petitioner subsequently filed his complaint in the United States Court for the Northern District of Ohio, alleging he was terminated in violation of the Family Medical Leave Act, 29 U.S.C. 2601 etc. and under Title VII of the Civil Rights Act, 42 U.S.C. 2000 e etc. and its Ohio counterpart, Ohio Revised Code Chapter 4112. Plaintiff's claims of discrimination were based on race and national origin, as the Petitioner alleged he was replaced by a Hispanic employee who was a friend of his district manager, who was Hispanic.

The lower court held Mr. Morris failed to present sufficient evidence of causation to sustain his claim. The court concluded, the Plaintiff had to show causation which included more than merely he took FMLA leave and he had the expectation of returning to his job. The Court held he had to show intent which the Court said he failed to do.

The Sixth Circuit, concluded Mr. Morris need not show intent as he could proceed under an interference theory, citing *Wysong v. Dow Chemical*, 503 50 3d 444, 446 (6th Cir. 2007). The Court said the intent behind the employer's conduct is irrelevant to an interference claim and he is entitled to get his job back as a matter of right.

Analyzing the merits of the Appellant's FMLA interference claim, the Court held Mr. Morris' mother did not have a "serious health condition" as it did not involve continuous treatment by a health care provider and thus Mr. Morris was not entitled to protection under the law.[1] As to the discrimination claim, the Sixth Circuit went on to say there could be no discrimination since the person who replaced the Petitioner was not similar "in all relevant aspects." The Court said the Petitioner failed to offer evidence of a non-white employee who was

[1]The Court also held he could proceed under a retaliation theory where claims are analyzed under the burden shifting framework established by *McDonnell Douglas Corporation v. Green* 411 U.S. 792, 92 S. Ct. 1817 (1973) but because his mother did not have a "serious health condition" he could not succeed as he could not establish a prima facie case.

treated differently upon return after requesting a vacation to visit a relative. He therefore failed to establish a prima facie case for discrimination.

REASONS FOR GRANTING THE PETITION

This case allows the Court to take a close look at what has been one of the most important pieces of legislation passed by Congress in the last 30 years; the Family Medical Leave Act and in particular the most important part of the legislation, what constitutes a "serious health condition." The law affects most working people attempting to balance the conflict and demands of work and their personal life.[2] The law recognizes there are times when a person is incapable of performing his or her work duties because of medical reasons either to themselves, or to close family members See

[2] According to the 2000 U.S. Department of Labor Report, "Balancing the Needs of Families and Employers: Family and Medical Leave Surveys," 35 million people have taken leave under the Act since its enactment. Slightly more than 50% took leave for their own serious illness. Costa N (ed) Highlights of the 2000 U.S. Department of Labor Report: Balancing the Needs of Families and Employers.

Price v. City of Fort Wayne, 117 F. 3d 1022, 1024-25 (7th Cir. 1997).

Based on the number of cases filed in court, The Family Medical Leave Act has not been without controversy. Employers have had to make accommodations generally on short notice for sick employees and members of their families. This has led to an increasing number of lawsuits seeking enforcement of the law, the vast majority of which have dealt with the issue posed herein; what is a serious health condition. Despite this litigation, the Supreme Court has considered only two cases involving the Family Medical Leave Act and neither considered the substantive provisions of the law[3], [4].

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[3] *Ragsdale v. Wolverine Worldwide, Inc.* 535 U.S. 81 (2002) where the Court considered the validity of a FMLA regulation which was "arbitrary, capacious or manifestly contrary to the statute." Id at 86 quoting *Cheven U.S.A. Inc v. Natural Resources Defense Counsel, Inc.*, 46 U.S. 837,844 (1984).

[4] *Nevada Department of Human Resources v. Hobbs*, 538 U.S. 721 (2003) where the Court concluded state employees could recover money damages from a state in federal court for violation of the FMLA.

The FMLA defines a "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involved (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. §2611(11). As defined in the regulations, where there is not inpatient care (an overnight stay) a "serious health condition" is described as requiring:

2) Continuing treatment by a health care provider. A serious health condition involving continuous treatment by a health care provider includes any one or more of the following:

> i. A period of incapacity (i.e. inability to work, attend school, or perform other regular daily activities due to the serious health condition, treatment therefore or recovery therefrom of more than three consecutive days and any subsequent treatment or period of

> incapacity relating to the same condition that also involves
> (A) treatment two or more times by a health provider, or...[5]

29 CFR 825.11(a)(2) etc.

The law does not state the treatment has to be both either before or after the period of incapacity but merely states "that it must also involve treatment" two or more times by a health care provider. "Treatment" is defined as "examinations to determine if a serious health condition exists and evaluations of the condition." 29 C.F.R. 825.114(b). To care for a family member with a serious health condition includes care for both physical and psychological conditions. 29 C.F.R. 825.116(a).

The term "incapacity" is not defined, but based on the plain meaning of the term, it should include Ms. Morris. She stated in her affidavit she had periods of inability to perform her regular

[5] The regulation also covers pregnancy and incapacity due to chronic serious health conditions. Both are not applicable here.

activities for more than three consecutive days, both before and after the biopsy. She also described receiving care and treatment by a health care provider at least five times, including seeing her primary care physician and the surgeon in the prediagnosis stage, and at least twice after the biopsy.

She went to her primary care physician when she first had a lump. She referred her to a breast surgeon who took a mammogram subsequently followed by a needle biopsy. Before the biopsy she described herself as being anxious and depressed, thinking she had cancer and was about to die. This made it impossible for her to care for herself, including tending to her personal needs and maintaining her house. She became housebound. In turn, her doctor prescribed certain drugs she had not taken before for anxiety and depression but they did not appreciably improve her condition.

After the biopsy she was bedridden for at least four days, during which time the Petitioner had to take care of her everyday needs. She

had headaches, stomach problems and dizziness, the result of what she believes was a reaction to the anesthesia administered at the time of the procedure. She gradually improved but her left breast continued to hurt, including after her first post surgical examination seven days after the surgery. In her affidavit, Ms. Morris said that she went back to see her surgeon and her primary care physician on at least two other occasions as she continued to have soreness in her breast.

The Seventh Circuit's *Price* decision, previously cited is in contrast to the Sixth Circuit's decision. There they took a far broader approach to the law. The *Price* case dealt with the question "can several diagnoses if temporally linked, no one of which rises alone to the level of a serious health condition, if taken together, constitute a serious health condition." The Seventh Circuit said it did not matter in what form a "serious health condition" took since under the FMLA, "it is not the disease that receives leave from work; it is the person." *Price* at 1025

In *Price*, when she first visited the doctor's office, the doctor described her as being "in an alarming condition." According to the doctor, she "was on the edge of a breakdown both physically and mentally;" that "there was no way [Price could perform her job, due to her mental and physical state] and...that to attempt to continue work in her condition would be seriously detrimental to her health." *Price* 1025. Subsequently she had a thyroid scan, and an excision of a mass three days later, which proved to be benign.

Similar to the *Price* case is the Fourth Circuit's decision of *Krenske v. Alexandria Motor Cars, Inc.*, 289 Fed. Appx 629, 2008 Westlaw, 3849766 (4th Cir. 2008). In this case, the lower court found Ms. Krenske was not suffering from a serious health condition. The employer and the lower court relied heavily on the position that Krenske never presented a diagnosis of her health condition, only the symptoms. The Fourth Circuit, relying on 29 C.F.R. §825.114, which provides that "treatment could include absence from work to receive medical treatment"

including "examination to determine if a serious health condition exists" said "...the framework created by the FMLA and its accompanying regulations focus on the impact of the symptoms and the scope of the treatment, not just the diagnosis which is eventually made. *Krenske* at 634. The Court went on to say the "record reflects the appellant missed the required four days of work for diagnostic treatment for a variety of cardiovascular and psychiatric problems." *Krenske* at 634

The *Krenske* and *Price* decisions are in contrast to the Sixth Circuit decision herein in that the Sixth Circuit found the treatment before and after the diagnosis temporally linked but still did not satisfy the requirement of a "serious health condition" as found in the regulations. Looking only at the treatment after the needle biopsy, the Court said it did not satisfy the "plain meaning" of a serious health condition and the relevant statutory and regulatory language." *Morris* at 338. The Petitioner contends the Court's interpretation was too limited.

Petitioner contends the focus of the law and regulation should not be just on the diagnosis which is eventually made, but rather the impact of the symptoms and the scope of treatment. This is where the 6th Circuit went wrong. They relied on the final diagnosis and only the treatment after the biopsy. Mr. Morris contends this was too narrow a focus.

CONCLUSION

Ask your spouse or significant other if she finds a lump in her breast if she has a "serious health condition." Ask your wife if the lump which is subsequently confirmed by mammogram as a mass requiring further diagnostics if she is anxious or depressed. From first hand experience as a husband and father of cancer survivors, I know how this can affect a women. My wife and daughter had great anxiety and were incapable of attending to their regular duties. My wife, whose condition was far less serious was in bed for the four days until her doctor told her the cancer was contained in only one breast. Her condition was not benign but

until she had the results of the biopsy she thought the worst. Under these circumstances, including those of Ms. Morris and other situations where a person believes she is facing a death-threatening condition, The Family Medical Leave Act should provide coverage. For the foregoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

SIXTH CIRCUIT COURT APPEALS FILINGS:

Order Denying Petition for Rehearing,
filed 06/01/09 ..... A1 - A2

Opinion,
filed 03/31/09 ..... B1 - B32

NORTHERN DISTRICT OF OHIO FILINGS:

Memorandum Opinion,
filed 03/21/07 ..... C1 - C44

Order,
filed 03/21/07 ..... D1 - D1

No. 07-3417

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBIN ALLEN MORRIS,

Plaintiff-Appellant,

v.

FAMILY DOLLAR STORES, INC.,

Defendant-Appellee.

ORDER

BEFORE: GIBBONS and SUTTON, Circuit Judges; and ACKERMAN*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on

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*Hon. Harold A. Ackerman, Senior United States District Judge for the District of New Jersey, sitting by designation.

the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green
Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 07-3417

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBIN ALLEN MORRIS,

Plaintiff-Appellant,

v.

FAMILY DOLLAR STORES OF OHIO, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: GIBBONS and SUTTON, Circuit Judges; and ACKERMAN, District Judge.*

JULIA SMITH GIBBONS, Circuit Judge. Plaintiff-appellant Robin Allen Morris appeals the district court's grant of summary judgment in favor

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*The Honorable Harold A. Ackerman, Senior United States District Judge for the District of New Jersey, sitting by designation.

of defendant-appellee Family Dollar Stores of Ohio, Inc. ("Family Dollar"). After Morris was terminated from Family Dollar, he filed a complaint against Family Dollar alleging: (1) violation of the Family Medical Leave Act ("FMLA"); (2) violations of Title VII of the Civil Rights Act of1964 ("Title VII") and Chapter 4112 of the Ohio Revised Code; and (3) violation of Ohio public policy. Morris argues that the district court erred by granting summary judgment on all three claims to Family Dollar. For the reasons that follow, we affirm the judgment of the district court.

I.

Morris, a white male, was hired by Family Dollar in December of 2001.[1] After six months as a Stock Associate, he was promoted to Assistant

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[1] Morris's brief refers to an affidavit that he contends he filed with the district court. There is no record that he filed this affidavit with the district court, and although he said he would file a separate motion regarding this matter, he never did. Therefore, this opinion only refers to facts included in the record on summary judgment motion.

Store Manager. In December of 2002, he was promoted to Store Manager by District Manager Juan Melendez. Morris served as Store Manager in several Family Dollar stores in the Cleveland, Ohio area before becoming the Store Manager at the West 73rd and Detroit Road store ("the Detroit Road Store" or "the store") in August or September of 2003.[2]

Ron Sheppard, a white male, was the Regional Manager during Morris's tenure as Store Manager. Rob Kozak was the District Manager for Family Dollar when Morris began working as manager of the Detroit Road Store.[3] Kozak is white. Melendez, an Hispanic male, took over as District Manager sometime during the summer of 2004. Paul Shnepp was the Assistant District Manager at this time. There was no evidence presented as to

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[2] Morris's deposition testimony states that he began working as manager at the Detroit Road Store in August 2004. It appears that he meant August 2003.

[3] Morris's deposition testimony says that Kozak was the District Manager in August 2004, but again, it appears that he meant August 2003, when Morris began at the Detroit Road store.

Schnepp's race or national origin. The two Assistant Store Managers at the Detroit Road Store, Mariely Capestany and Carlos Lozado, are both Hispanic.

Sometime around mid-October 2004, Morris asked Melendez for one week of vacation beginning on October 29. Morris testified that Melendez approved the vacation, but "had some other negative things to say," including "cussing" at Morris like a "freaking maniac." (Morris Depo. at 91-97.) Morris also indicated that he contacted Human Resources regarding this incident and that Melendez later apologized. Melendez testified that he did not speak directly with Morris but that he heard about Morris's request from Schnepp. Whether through Morris directly or through Schnepp, Melendez was informed that Morris had requested one week of vacation to visit his mother, Betty Morris, who lived out of state and was undergoing surgery. Melendez approved Morris's request and never inquired as to the details of Morris's mother's condition or whether Morris's leave would fall under the FMLA.

Morris was at his mother's home in Parkersburg, West Virginia from October 29 through

November 7, 2004. On October 29, Betty Morris underwent an outpatient needle biopsy of a lump in her left breast. Following the biopsy, she was bedridden for at least four days. During this time, Morris helped her with cooking, housekeeping, and bathing. During his deposition, Morris was asked if his mother was ever incapacitated, to which he answered "no." Betty Morris claims that during this time she suffered from headaches, stomach problems, dizziness from anesthesia administered during her biopsy, and pain and discomfort in her breast. Betty Morris learned that the lump was benign on or about November 1 when she received the results of the pathology report. She also saw Dr. Adam Kaplan for a post-surgical follow-up examination on November 8, 2004 and returned at least twice more as a result of the continued soreness in her breast.

Morris contends that while he was at his mother's home, he called the store to inquire about operations but did not speak to Melendez. Morris drove back to Cleveland on November 7, 2004.

Morris claims that he returned to the store at his usual time, 4:00 a.m, on November 8, 2004. When he arrived, Morris saw a locksmith changing the locks to the store.[4] He also saw his eventual replacement, Jose Rivera, working to open the store. Rivera is Hispanic. Morris testified that Rivera told him that he should contact Melendez regarding his employment.

At that point, Morris says that he returned home and at approximately 6:30 a.m. he called Melendez, leaving a voice message asking Melendez to call him regarding his employment. After his call was not returned, Morris says that he called Melendez at least twice more between 6:30 and 7:30 a.m., again leaving messages. Following this last call to Melendez, Morris did not attempt to contact anyone else at Family Dollar about his employment. Melendez never returned Morris's

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[4] According to Melendez, the locks were changed for reasons unrelated to Morris's employment. Indeed, Morris stated that on the morning of November 8, loss prevention specialists were present at the scene, and Rivera told him that there were some issues regarding staff stealing from the store.

calls and denies receiving any phone calls from Morris.

Morris did not return to the store after November 8, 2004 and did not work any scheduled shifts after his week caring for his mother. Morris was officially terminated in mid-November 2004; on November 28, 2004, Morris was officially replaced by Rivera who had formerly been a Store Manager at another Family Dollar store.

Morris filed a complaint against Family Dollar in Ohio state court alleging: (1) violation of the FMLA because he was terminated while caring for his mother; (2) race or national origin discrimination in violation of Title VII and Chapter 4112 of the Ohio Revised Code based on the fact that (a) he was terminated and replaced by a less qualified Hispanic candidate, and (b) Family Dollar discriminates against non-Hispanic employees "by failing to hire them and/or relegating them to certain positions at certain stores and failing to promote them to higher paying and/or supervisory positions"; and (3) violation of Ohio common law for wrongful discharge. Family Dollar removed this action to federal court.

With respect to the Title VII claim, Morris contends that Melendez, his District Manager, wanted to replace him with Rivera-an Hispanic Store Manager from another store, and alleged friend of Melendez-so that the store would have more Hispanic workers.

Family Dollar claims that Morris was not terminated because of his vacation, but terminated because he abandoned his employment. As evidence for this conclusion, it alleges that (1) Morris missed all of his remaining shifts without contacting Family Dollar; (2) Morris left his keys at the store; and (3) Melendez was informed by Capestany that Morris had called her on November 7, 2004 and resigned. In response, Morris contends there were only two sets of store keys and that he left his set at the Store during his absence for use by the Assistant Store Managers. He also denies that the alleged phone conversation with Capestany ever took place and argues that because Capestany did not appear at her deposition, her statement constitutes

inadmissible hearsay that should not have been considered by the district court. [5]

The district court granted Family Dollar's motion for summary judgment as to each of Morris's claims.

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[5] Capestany's statement was contained in her affidavit submitted to the district court as an exhibit attached to Family Dollar's motion for summary judgment. Capestany's affidavit also states that Morris did not report to the store on November 8, 2004 and that Morris called her that day to ask that she have Melendez call him. Morris attempted to depose Capestany, but she did not appear for her scheduled deposition. Morris filed a motion *in limine*, asking that the district court not consider Capestany's statement.

Because the district court did not rule on this motion yet referenced Capestany's statements in its opinion, Morris contends that the district court erred in "basing its decision" on these alleged hearsay statements. We address this issue in our discussion of Morris's FMLA claims.

II.

We review a district court's grant of summary judgment *de novo*. *See Davenport v. Causey*, 521 F.3d 544, 550 (6th Cir. 2008). Summary judgment will be affirmed if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is not appropriate if "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). We draw all justifiable inferences in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III.

Morris first argues that the district court erred in granting summary judgment to Family Dollar with respect to his FMLA claim. The FMLA entitles an eligible employee[6] to twelve weeks of leave during

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[6] Pursuant to 29 U.S.C. § 2611(2)(A), an "'eligible employee' means an employee who has been

any twelve-month period in order to care for a parent of the employee if that parent has a "serious healthcondition." 29 US.C. § 2612(a)(1)(C). There are two theories of recovery under the FMLA, which this court has summarized as follows:

> The "entitlement" or "interference" theory arises from [29 U.S.C.] § 2615(a)(1), which states that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided in this subchapter," and from [29 U.S.C.] § 2614(a)(1), which provides that "any eligible employee who takes leave. . . shall be entitled, on return from such leave (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or (B) to be restored to

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employed --(I) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period." Here there is no dispute that Morris qualifies as an "eligible employee."

> an equivalent position." The "retaliation" or "discrimination" theory arises from [29 U.S.C.] § 2615(a)(2), which provides that "[i]t shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter."

Arban v. West Pub. Corp., 345 F.3d 390, 400-01 (6th Cir. 2003). Morris asserts both theories on appeal.

A. FMLA Interference Theory

1. Preservation of Claim under the FMLA Interference Theory

First, Family Dollar argues that Morris did not preserve a claim based on the interference theory because he failed to clarify which theory he was advancing before the district court. Morris's complaint and response to Family Dollar's motion for summary judgment did not distinguish between the two theories.[7] The district court analyzed

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[7] Morris's response to Family Dollar's motion for summary judgment included four sections

Morris's FMLA claim under the retaliation theory only.

In general, "[i]ssues that are not squarely presented to the trial court are considered waived and may not be raised on appeal." *Thurman v.*

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addressing his FMLA claim. Section One is entitled "Plaintiff was qualified for FMLA leave" and argues that Morris is an eligible employee, an element required for both types of claims. This section cites an interference theory case, *Pharakhone v. Nissan North America, Inc.*, 324 F.3d 405 (6th Cir. 2003). Section Two is entitled "The Plaintiff Gave Proper Notice," again a required element for both types of claims. Section Three is entitled "Plaintiffs Mother Suffered From a 'Serious Health Condition,'" another requirement of both claims. Section Four is entitled "There is a Causal Connection Between Plaintiffs Leave and His Termination." This is the fourth element of a *retaliation* claim. At the end of this fourth section, Morris discusses the framework for a retaliation case, citing two retaliation cases, *Skrjanc v. Great Lakes Power Service Co.*, 272 F.3d 309 (6th Cir. 2001), and *Canitia v. Yellow Freight Systems, Inc.*, 903 F .2d 1064, 1066 (6th Cir.1990). The district court assumed that Morris raised only a retaliation claim. *Morris v. Family Dollar Stores of Ohio, Inc.*, No. 1:05 CV 2211, 2007 WL 893051, at *6 (N.D. Ohio Mar. 21, 2007).

Yellow Freight Sys., Inc., 90 F.3d 1160, 1172 (6th Cir. 1996). In the context of FMLA claims, however, this court recently concluded that a plaintiff had not waived a claim based on the interference theory where the complaint alleged general violations of 29 U.S.C. § 2615 that could apply both to interference and retaliation claims. *Wysong v. Dow Chem. Co.*, 503 F.3d 441, 446 (6th Cir. 2007). In reversing the district court's rejection of the plaintiffs interference claim as "an overly rigid approach which stands in conflict with our notice-pleading system," *id.*, we explained in *Wysong* that" [a] defendant looking at [the plaintiff' s] complaint would be on sufficient notice that she was broadly alleging violations under 29 U.S.C. § 2615, and that her FMLA claim could encompass either the interference theory, the retaliation theory, or both theories." *Id.* This court emphasized that ambiguity on a plaintiffs complaint does not waive an interference claim and "does not box plaintiffs into one theory or the other." *Id.*

Although *Wysong* involved the issue of whether a plaintiff had waived an argument before the district court instead of the appellate court, we find that our reasoning in *Wysong* applies

equally to the situation at hand.[8] Although Morris should have clarified the theory on which he premised his claim, Family Dollar was clearly on notice that he might be advancing an interference

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[8] Family Dollar argues that this case is controlled by the unpublished opinion in *Conner v. Hardee's Food Systems, Inc.*, 65 F. App'x 19 (6th Cir. 2003). In *Conner*, the plaintiffs' complaint alleged the breach of an implied contract without specifying whether the plaintiffs were advancing an implied-in-fact or implied-in-law theory of recovery. *Id.* at 24. After the defendant briefed both theories in its motion for summary judgment, the plaintiffs' response failed to clarify which theory they were advancing or explicitly state that they were proceeding upon a contract implied-in-law theory (although some language in their brief and one case cited suggested this theory). *Id.* The *Conner* court concluded that the claim was waived because the plaintiffs had "failed to brief the issue before the district court, and because the district court did not rule on the issue in its opinion." *Id.* at 24-25. Unlike the fairly different contract implied-in-law and contract implied-in-fact theories at issue in *Conner*, the FMLA interference and retaliation theories at issue here are closely related and largely overlap. Because of the similar nature of the two theories and *Wysong's* on-point reasoning, we find *Conner* inapplicable.

claim-an issue it briefed below and on appeal. Given the overlapping nature of the two claims and the ambiguous nature of Morris's complaint, we will address both claims.

2. Merits of FMLA Interference Theory Claim

To establish a claim under the interference theory, a plaintiff must show that: (1) he was an eligible employee; (2) his employer was a covered employer; (3) he was entitled to leave under the FMLA; (4) he gave his employer notice of his intent to take leave; and (5) his employer denied him FMLA benefits or interfered with FMLA rights to which he was entitled. *Cavin v. Honda of Am. Mfg., Inc.*, 346 F.3d 713, 719 (6th Cir. 2003). The intent behind the employer's conduct is not relevant to an interference claim. *Arban*, 345 F.3d at 401.

Family Dollar does not dispute that Morris is an eligible employee and that Family Dollar is a covered employer. Family Dollar contends, however, that Morris was not entitled to leave under the FMLA; that if he was entitled, he did not provide sufficient notice; and that even if he did

provide notice, Family Dollar did not interfere with his FMLA rights.

The FMLA "entitle[s] employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." 29 U.S.C. § 2601(b)(2). The statutory language of the FMLA limits "serious health condition" to "an illness, injury, impairment, or physical or mental condition that involves. . . inpatient care. . . or. . . continuing treatment by a health care provider." 29 U.S.C. § 2611(11). The regulations, in effect at the time the underlying conduct occurred, further defined "continuing treatment" as a "period of incapacity . . . of more than three consecutive calendar days. . . that also involves. . . [t]reatment two or more times by a health care provider. . . or . . . [t]reatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider." 29 C.F.R. § 825.114(a)(1)-(2) (2003).[9]

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[9] The Department of Labor has recently promulgated new regulations interpreting the

The legislative history clarifies that the FMLA "is not intended to cover short-term conditions for which treatment and recovery are very brief." S. Rep. No. 103-3, at 28 (1993), as reprinted in 1993 U.S.C.C.A.N. 3, 30 (emphasis added). "Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period." *Id.; see Beaver v. RGIS Inventory Specialists, Inc.*, 144 F. App'x 452, 456 (6th Cir. 2005) (collecting cases where plaintiffs' claims were denied because their "routine, short-term illnesses [were] not covered by the FMLA").

Morris contends that Betty Morris had a "serious health condition involving continuing treatment" based upon 29 C.F.R. § 825.114 (2003). Morris has offered some evidence of Betty Morris's

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phrase "serious health condition." *See* The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67934, 68079 (Nov. 17, 2008). Those regulations took effect on January 16, 2009, *id.* at 67934, and neither party argues that they should be applied retroactively here.

health condition including: his own testimony that she needed help getting in and out of the shower and with household chores, and that she had trouble walking for approximately four days; and Betty Morris's affidavit, providing that following the biopsy, she was "bedridden for at least four days and her son had to take care of her every day needs." (Betty Morris Aff. at 1.)

However, Morris conceded that his mother was not "incapacitated." (Morris Depo. at 107.) Morris also does not dispute that after the biopsy, Betty Morris received a pathology report that the lump was benign, and she did not see her doctor again until a follow-up visit ten days after the biopsy. An outpatient procedure with a follow-up appointment is not a "regimen of continuing treatment." 29 C.F.R. § 825.114(a)(2)(i)(B) (2003). Neither does it constitute "[t]reatment two or more times by a health care provider." 29 C.F.R. § 825.115(a)(2)(i)(A) (2003); *see Doughtie v. Ashland, Inc.*, No. 03-2073, 2005 WL 1239286, at *4 (W.D. Tenn. May 24, 2005) (follow-up visit with doctor eleven days after plaintiff had returned to work did not count as a second treatment by a health care provider); *see also Jones v. Denver Pub. Schs.*, 427

F.3d 1315, 1321 (10th Cir. 2005) ("[T]o qualify for FMLA protection, the health condition must be sufficiently serious that it entails an absence of more than three consecutive calendar days during which the employee obtained treatment by a health care provider at least two times (or one time followed by a regimen of continuing treatment)."); *Perry v. Jaguar of Troy*, 353 F.3d 510, 515 (6th Cir. 2003) (periodic examinations every six months did not render the condition a "serious health condition"); *Marchisheck v. San Mateo County*, 199 F.3d 1068, 1075 (9th Cir. 1999) (pre-arranged drug counseling session did not qualify as continuing treatment).

As the district court commented, "the Court has serious doubts as to whether an outpatient needle biopsy with one follow-up visit two weeks later would constitute a 'serious medical condition' for purposes of the FMLA." *Morris v. Family Dollar Stores of Ohio, Inc.*, No.1 :05 CV 2211, 2007 WL 893051, at *7 n.4 (N.D. Ohio Mar. 21, 2007). We agree. The outpatient needle biopsy involved neither inpatient treatment nor continuing treatment by a healthcare provider and simply does not satisfy the plain meaning of a "serious

health condition" in the relevant statutory and regulatory language.

Because Morris failed to establish that Betty Morris had a "serious health condition" under the FMLA, we find that he did not make out a *prima facie* case under the interference theory. Thus, we do not need to address the other prongs of his interference claim.

B. FMLA Retaliation Theory

FMLA retaliation theory claims are analyzed under the burden-shifting framework established by *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973). *See Edgar v. JAC Prods.*, 443 F.3d 501,508 (6th Cir. 2006). To establish an initial *prima facie* case of retaliation, a plaintiff must show the following by a preponderance of the evidence: "(1) he engaged in an activity protected by the [FMLA]; (2) that this exercise of his protected rights was known to the defendant; (3) that defendant thereafter took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Arban*, 345 F.3d

at 404. The significant difference between an interference and a retaliation claim is the causal connection element, which encompasses an employer's intent; in contrast to the interference theory, under the retaliation theory, "the employer's motive is an integral part of the analysis." *Edgar*, 443 F.3d at 508. If the plaintiff can prove a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employer's action. *McDonnell Douglas*, 411 U.S. at 802. If the defendant carries this burden, the plaintiff must show that the legitimate reasons offered by the defendant are pretextual. *Id.* at 804.

Because Morris's leave was not on account of a serious health condition, he cannot establish the first element, that he engaged in an activity protected by the FMLA. For the same reasons that Morris's FMLA interference claim fails, we affirm the grant of summary judgment to Family Dollar on Morris's FMLA retaliation claim.

C. Capestany's Statements

Morris claims that the district court improperly relied on Capestany's statements in its decision. Her affidavit was submitted to the district court as an exhibit attached to Family Dollar's motion for summary judgment. Capestany's affidavit included the following facts: Morris called her on November 7, 2004 to tell her that he would not be returning to work; Morris did not come to the store on November 8; and Morris called her on November 8 to ask that she have Melendez call him. Because Capestany did not appear for her scheduled deposition, Morris filed a motion *in limine*, requesting that the district court not consider Capestany' s affidavit. The district court did not rule on this motion but referenced Capestany's statements in its opinion. On appeal, Morris contends that the district court erred in "basing its decision" on these alleged hearsay statements.

Because we find that Morris did not establish a *prima facie* FMLA case, Capestany's statements about Morris's termination are irrelevant to our

analysis. Therefore, resolution of the potential hearsay issues is not necessary.[10]

IV.

Morris next argues that the district court erred by granting Family Dollar summary judgment with respect to Morris's claims of race/national origin discrimination under Title VII and Chapter 4112 of the Ohio Revised Code. Federal case law interpreting Title VII applies to cases involving alleged violations of Chapter 4112 of the Ohio Revised Code. *See Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm'n*, 421 N.E.2d 128, 131 (Ohio 1981). Thus, "federal and state claims may be analyzed together. . . because 'Ohio's requirements are the same as under federal law. '" *Russell v. Univ. of Toledo*, 537 F.3d 596, 604 (6th Cir. 2008) (quoting *Carter v. Univ. of Toledo*, 349 F.3d 269, 272 (6th Cir.

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[10] Morris's statements to Capestany appear to be admissible admissions against interest. The viable evidentiary issue is whether the district court should have considered Capestany's affidavit in view of her failure to appear for her deposition - an issue which we need not reach.

2003)). The following analysis of Title VII law therefore applies to Morris's claims under both Title VII and Chapter 4112 of the Ohio Revised Code.

Because Morris offers circumstantial, as opposed to direct, evidence of discrimination, he must satisfy the Supreme Court's burden-shifting framework:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dep't ofCmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (internal citations omitted). To establish a *prima facie* case of Title VII

discrimination in a typical case, a plaintiff must show that: "1) he is a member of a protected class; 2) was qualified for the job; 3) he suffered an adverse employment decision; and 4) was replaced by a person outside the protected class or treated differently than similarly non-protected employees." *Newman v. Fed. Express Corp.*, 266 F.3d 401, 406 (6th Cir. 2001). However, in a reverse discrimination case-where a member of the racial majority claims racial discrimination-the first and fourth prongs of the test are different. To satisfy the first prong of the test, "the plaintiff must demonstrate background circumstances [to] support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Sutherland v. Mich. Dep't of Treasury*, 344 F.3d 603, 614 (6th Cir. 2003) (alteration in original) (internal quotation marks and citation omitted). To satisfy the fourth prong in a reverse discrimination case, the plaintiff must show that the defendant treated minority employees who were similarly situated to the plaintiff more favorably than he was treated. *Id*.

A. *Prima Facie* Case

1. Background Circumstances

As an initial matter, Morris suggests that we should abandon the background circumstances test altogether-an argument Family Dollar contends he did not preserve. We need not labor over the preservation issue. One panel cannot disregard the decisions of prior panels. *Bowling Transp., Inc. v. NLRB*, 352 F.3d 274, 282 (6th Cir. 2003).

Morris's alternative argument is that he *has* alleged sufficient background circumstances: Morris is white; Melendez is Hispanic; and Melendez replaced Morris with Rivera, an Hispanic employee.

A plaintiff may establish background circumstances by providing "evidence of the defendants' unlawful consideration of race in employment decisions in the past." *Sutherland*, 344 F.3d at 615. This court has held that a plaintiff can demonstrate background circumstances by showing simply that the employer was a member of the same minority race as the employees he was promoting. *See Zambetti v. Cuyahoga Cnty.*

Coll., 314 F.3d 249,257 (6th Cir. 2002) (relying on the single factor that the police chief was African-American and was promoting African-Americans).

The district court found that Morris had not shown background circumstances. Searching only for evidence that Family Dollar had unlawfully considered race as a factor in the past, the district court concluded: "Family Dollar management was composed of individuals of various races, who hired and fired individuals of various races. Employees of various races were frequently promoted and/or moved between stores." *Morris*, 2007 WL 893051, at *10. Family Dollar suggests that to establish background circumstances, Morris *must* show that Family Dollar unlawfully considered race in employment decisions in the past. But *Zambetti* was careful to say only that a plaintiff "can present" such evidence to show background circumstances. 314 F. 3 d at 25 6 (emphasis added) (citing *Jamison v. Storer Broad. Co.*, 830 F.2d 194 (6th Cir. 1987) (table)); *accord Sutherland*, 344 F.3d at 615. Following *Zambetti's* reasoning that "the mere fact that an adverse employment decision was made by a member of a racial minority is sufficient to establish the first prong of the *prima*

facie case," *Arendale v. City of Memphis*, 519 F.3d 587, 603 (6th Cir. 2008), Morris has provided the requisite background circumstances by showing that Melendez is Hispanic and that he replaced Morris with an Hispanic employee.

2. Similarly Situated

In a Title VII reverse discrimination case, this court has explained that "[i]n order for. . . employees to be considered similarly-situated . . . the plaintiff must prove that all of the relevant aspects of his employment situation are nearly identical to those of the [minority] employees who he alleges were treated more favorably." *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994) (internal citations and quotation marks omitted). The "plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment," *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998), but the plaintiff needs to be similar in "all of the *relevant* aspects." *Id.* (quoting *Pierce*, 40 F.3d at 802). Where an employee alleges discriminatory disciplinary action, this court has further explained that "the individuals with whom

the plaintiff seeks to compare his/her treatment must. . . have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992).

Morris has not provided evidence of an employee similarly situated "in all relevant aspects." *Pierce*, 40 F.3d at 802 (internal quotation marks omitted). To show this, he must show that another employee "engaged in the same conduct" without receiving the same consequences. *See Mitchell*, 964 F.2d at 583. Morris has offered no evidence that a non-white employee requested vacation to visit a relative and was treated differently upon return. Having failed to make a showing of a similarly situated employee, Morris cannot establish a *prima facie* case of discrimination. *Arendale*, 519 F.3d at 604.[11]

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[11] As evidence of bias in favor of Hispanic employees, Morris presented evidence that Rivera was paid slightly higher than he was, despite his lesser seniority. To the extent that this could constitute support for a Title VII wage discrimination claim, as opposed to a Title VII termination claim,

V.

Lastly, Morris argues that the district court erred by dismissing his tort claim that his discharge violated Ohio public policy. Any alleged violation of Ohio public policy derived from a violation of the FMLA, Title VII, or the Ohio Revised Code is dependent upon the violation of one of those statutes.[12] *See Skrjanc*, 272 F.3d at 317; *Hausler v.*

Morris has since waived the claim because he failed to argue wage discrimination either before the district court or on appeal and presented this evidence only to support his termination claim. *See Dillery v. City of Sandusky*, 398 F.3d 562, 569 (6th Cir. 2005) ("'[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'" (quoting *United States v. Layne*, 192 F.3d 556, 566 (6th Cir. 1999))); *see also Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 311 (6th Cir. 2005) ("(plaintiff's] failure to raise an argument in his appellate brief constitutes a waiver of the argument on appeal.").

[12] Morris acknowledges that the FMLA cannot serve as the "policy" basis for his public policy claim following *Wiles v. Medina Auto Parts*, 773 N.E.2d 526 (Ohio 2002). In *Wiles*, the Ohio Supreme Court concluded that because "the statutory remedies

Gen. Elec. Co., 134 F. App'x 890, 895 (6th Cir. 2005) ("Public policy claims necessarily fail where the underlying statutory claims fail." (citing *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365, 375 (6th Cir. 1999))). Because Morris has failed to establish a *prima facie* case of discrimination under the FMLA, Title VII, or the. Ohio Revised Code, his tort claim fails as a matter of law.

VI.

For the foregoing reasons, we affirm the judgment of the district court.

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in the FMLA adequately protect the public policy embedded in the [FMLA]," a case alleging a violation of the FMLA could not establish the requisite elements of a claim of wrongful discharge in violation of public policy. *Id.* at 535.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBIN ALLEN MORRIS, CASE NO. 1:05 CV 2211

Plaintiff,

v. JUDGE DONALD C. NUGENT

FAMILY DOLLAR STORES OF OHIO, INC.,

Defendant.

MEMORANDUM OPINION

This matter is before the Court on Defendant's Motion for Summary Judgment. Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant Family Dollar Stores of Ohio, Inc., has petitioned the Court for summary judgment on all of Plaintiff's claims. Plaintiff's First Cause of Action alleges that Plaintiff's employment was terminated in violation of the Family and Medical Leave Act of 1993 ('FMLA"), 29 U.S.C. § 2611, et seq. Plaintiff's Second Cause of Action is a reverse discrimination claim. Plaintiff alleges that he was terminated because he is white/non-Hispanic, in violation of the protections set forth in Title VII of

the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Plaintiff's Third Cause of Action alleges wrongful termination of his employment based on national origin in violation of Chapter 4112 of the Ohio Revised Code and wrongful termination in violation of Ohio's public policy, based upon his claims that he was terminated in violation of the FMLA; Title VII; and, Chapter 4112 of the Ohio Revised Code. For the reasons set forth below, Defendant's Motion for Summary Judgment is GRANTED.

FACTUAL BACKGROUND

Plaintiff was hired by Defendant, Family Dollar in December 2001 as a Stock Associate. After six months, Plaintiff was promoted to Assistant Store Manager and less than one year later, in December 2002, Plaintiff was promoted to Store Manager. (Plaintiff's Response to Defendant's Motion for Summary Judgment at p. 2.) Plaintiff served as Store Manager in several Family Dollar stores in the area and in September 2003, became the Store Manager of the Family Dollar Store located at West 73rd and Detroit Road in Cleveland, Ohio ("the Detroit Road Store"). (*Id.*)

Ron Sheppard, a white male, was the Regional Manager for Family Dollar at the time in question. (Plaintiff's Depo. at pp. 159-60.) Juan Melendez, a Hispanic male, was Plaintiff's District Manager. (*Id.* at pp. 49, 54, 86; Melendez Depo. at p. 130.) Paul Shnepp was Plaintiff's Assistant District Manager. (Melendez Depo. at pp. 13-16.) There was no evidence presented as to Mr. Schnepp's race/national origin. The two Assistant Store Managers at the Detroit Road Store, Mariely Capestany and Carlos Lozado, are both Hispanic. (Plaintiff's Depo. at pp. 54-55.) Plaintiff was the Store Manger at the Detroit Road Store until his employment ended in November 2004.

In late October 2004, Plaintiff informed either Mr. Melendez, his District Manager, or the Assistant District Manager, Paul Schnepp, that he wanted to take one week of vacation because his mother, who lives out of state, was undergoing surgery. (Plaintiff's Response Brief at p. 3.) Plaintiff's request was approved. (*Id.*) He never inquired whether the leave would fall under the Family Medical Leave Act. (*Id.*)

On October 29, 2004, Plaintiff's mother underwent an outpatient needle biopsy of a lump in her breast. Plaintiff felt he had to be with his mother for the procedure because he thought she had cancer and knew she would be physically and mentally bothered by the procedure. (*Id.* at pp. 3-4.) Plaintiff stated that upon release from the hospital, his mother was bedridden for at least four days and he had to take care of her everyday needs. (*Id.* at p. 4.) Plaintiff stated that he cooked her meals and helped her to the bathroom. (*Id.*) Plaintiff claims that his mother suffered from headaches, stomach problems and dizziness, which she believes resulted from the anesthesia administered at the time of the biopsy. (*Id.*) In addition, she had pain and discomfort in her breast. (*Id.*)

Plaintiff tended to his mother's care from October 30, 2004 through November 6, 2004. Plaintiff stated that he called the Store throughout the week to inquire about operations. (Plaintiff's Depo. at pp. 98-103.) Plaintiff did not speak to his District Manager, Mr. Melendez, during that week. (*Id.* at p. 110.) Plaintiff drove back to Cleveland on November 7,2004. (*Id.* at p. 103.) On November 8,

2004, Plaintiff claims that he arrived back at the store at 4:00 a.m. to meet the trucks delivering new merchandise and prepare the store. (Plaintiff's Response Brief at p. 4.) Plaintiff claims that when he arrived, he found a locksmith changing the locks to the store. (*Id.*) According to deposition testimony, the locks were changed for reasons unrelated to Plaintiff's employment. (Melendez Depo. at pp. 83-84.) Plaintiff claims that two individuals were working to get the store open, one of whom was his eventual replacement, Jose Rivera. (Plaintiff's Response Brief at p. 4.) Plaintiff claims that Mr. Rivera told him that he should call Mr. Melendez regarding his employment. (*Id.*)

At that point, Plaintiff stated that he returned home and at approximately 6:30 a.m. on that morning, November 8, 2004, called Mr. Melendez and left a voice mail message. (*Id.*) After his call was not returned, Plaintiff stated that he called Mr. Melendez again at least twice, the last call occurring at approximately 7:30 a.m., leaving voicemails. (*Id.* at p.5.) Plaintiff stated that neither Mr. Melendez, nor anyone at else Family Dollar, returned his calls. (*Id.*) According, to Plaintiff he did not attempt to contact anyone else at Family

Dollar regarding his employment subsequent to his call to Mr. Melendez's voice mail at 7:30 a.m. on Monday, November 8, 2004. (Plaintiffs Depo. at pp. 130-151.) Plaintiff's employment with Family Dollar was officially terminated in mid-November 2004.

Plaintiff claims that he was terminated as a result of taking FMLA leave, relying upon the temporal proximity between his one week leave and his termination. Plaintiff also claims that he was discriminated against on the basis of his race, white/non-Hispanic. Specifically, Plaintiff claims that Mr. Melendez, his District Manager, wanted to replace him with Jose Rivera, a Hispanic Store Manager from another store, and alleged friend of Mr. Melendez, so that the store would have more Hispanic workers.

Defendant contends that Plaintiff was not terminated, but rather abandoned his employment with Family Dollar. Defendant asserts that Mr. Melendez was informed by Assistant Store Manager Mariely Capestany that Plaintiff had called her on November 7, 2004 and informed her

that he was resigning.[1] Mr. Melendez claims that he unsuccessfully attempted to contact Plaintiff about his employment status on November 7, 2004 and November 8, 2004. Based upon Ms. Capestany's alleged conversation with Plaintiff; the fact that Plaintiff had left his keys in the store when he left for vacation;[2] and, Mr. Melendez's alleged inability to contact Plaintiff, Defendant claims that Mr. Melendez believed that Plaintiff abandoned his employment. Plaintiff was eventually replaced by

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[1]Defendant submits the statement of Mariely Capestany as Exhibit A. Ms. Capestany states on November 7, 2004, Plaintiff called her and told her he would not be returning to work. Ms. Capestany claims that Plaintiff told her to call Juan Melendez and let him know that he would not be returning. Plaintiff claims that this conversation never took place. Ms. Capestany claims that Plaintiff did not show up at the store on November 8, 2004 and that he called her that day to ask that she have Mr. Melendez call him. Plaintiff attempted to depose Ms. Capestany but she did not appear for deposition.

[2]Plaintiff stated during deposition that there were only two sets of store keys and that he left his set at the Store during his absence for use by the Assistant Store Managers.

Jose Rivera. Mr. Rivera, a Hispanic male, was a Store Manager at another Family Dollar store when he was transferred to replace Plaintiff.

Although he claims to have left messages for Mr. Melendez on November 8, 2004, Plaintiff never spoke to Mr. Melendez on November 8, 2004, nor at any time thereafter, regarding his employment. (Plaintiff's Depo. at pp. 147-149.) Plaintiff never contacted Family Dollar Human Resources regarding his employment status, even though he had contacted them in the past regarding at least one unrelated issue. (*Id*. at 148.) Plaintiff never returned to the Store after November 8, 2004 and did not work any of his scheduled shifts after returning from his leave. (*Id*. at pp. 146-47.) Based upon these actions and/or inactions by Plaintiff, and the statement of Ms. Capestany that Plaintiff had resigned, Defendant claims that it processed Plaintiff's termination.

Plaintiff claims that he never told Ms. Capestany that he intended to resign. Rather, Plaintiff asserts that he was terminated because he took FMLA leave and because Mr. Melendez

wanted to replace him with a Hispanic employee, Mr. Rivera.

PROCEDURAL HISTORY

On August 30, 2005, Plaintiff filed his Complaint in the Cuyahoga County Court of Common Pleas, Case No. CV05570948. On September 20, 2005, Defendant filed its Notice of Removal to this Court. (Docket #1.) In his First Cause of Action, Plaintiff alleges that he was terminated for absences in violation of the FMLA. In his Second Cause of Action, Plaintiff claims that he was terminated from his position, and replaced by a Hispanic male who was a friend of Plaintiff's District Manager, in violation of Title VII. In his Third Cause of Action, Plaintiff states that Defendant's discriminatory actions were in violation of the Ohio Civil Rights Act and/or in violation of Ohio public policy for wrongful discharge.

On October 20, 2006, Defendant filed its Motion for Summary Judgment. (Docket #28.) First, Defendant claims that Plaintiff cannot establish he qualified for FMLA leave as a matter of law. Specifically, Defendant claims that Plaintiff never

specifically requested FMLA leave, nor did he provide Defendant with sufficient details from which it could reasonably conclude that Plaintiff's vacation request was FMLA-qualifying; that Plaintiff cannot establish that his mother suffered from a "serious health condition" at the time he took vacation leave; that Plaintiff voluntarily abandoned his job and therefore cannot prove he suffered an adverse employment action; and, that there is absolutely no evidence of a causal connection between Plaintiff's leave and his termination. Further, Defendant states that it had a legitimate, non-discriminatory reason for replacing Plaintiff, the belief that Plaintiff had voluntarily abandoned his job. Defendant asserts that Plaintiff has failed to set forth evidence that its legitimate, non-discriminatory reason for replacing Plaintiff was pretextual.

Second, Defendant argues that Plaintiff has not set forth sufficient evidence to withstand summary judgment as to his reverse discrimination claims under Title VII and/or Chapter 4112 of the Ohio Revised Code. Defendant asserts that Plaintiff has no direct evidence of reverse race discrimination and cannot establish a prima facie

case of reverse discrimination necessary to proceed on an indirect evidence case. Specifically, Defendant states that Plaintiff has failed to "clear the first hurdle" of a reverse discrimination analysis by failing to present evidence that Family Dollar has a history of discriminating against white employees, or that it is the "unusual employer who discriminates against the majority." Further, Defendant asserts that Plaintiff fails to establish a prima facie case of reverse discrimination because he cannot prove that he was treated with disfavor as compared to "similarly situated" Hispanic and/or foreign born employees.

Third, Defendant argues that Plaintiff cannot establish a claim for wrongful discharge in violation of Ohio public policy because the statutes at issue provide substantive rights and remedies which adequately protect society's interests.

On November 30, 2006, Plaintiff filed his Response to Defendant's Motion for Summary Judgment. (Docket #31.) With regard to his FMLA claim, Plaintiff claims that he was qualified for FMLA leave; gave proper notice that he was taking

leave under the FMLA; that his mother suffered from a "serious health condition" as defined in 29 U.S.C. § 2601(b)(2); and, that there was a causal connection between Plaintiff's leave and his termination. With regard to causation, Plaintiff asserts that there is a genuine issue of material fact as to whether Mr. Morris quit or was fired, establishing that the reason for termination articulated by Defendant was pretextual.

With regard to his Title VII and Ohio Rev. Code Chapter 4112 claims, Plaintiff points to the fact that he was replaced with a Hispanic Store Manager, Jose Rivera, by a Hispanic District Manager, Juan Melendez. Plaintiff asserts that the reason advanced by Defendant for replacing Plaintiff, that Plaintiff had abandoned his job, is a pretext for reverse discrimination. Specifically, Plaintiff states that "Mr. Melendez wanted to place a Hispanic in the store which was located in a Hispanic neighborhood and which was staffed by mostly Hispanic sur named employees." Plaintiff states that he was doing an excellent job when he was replaced and argues that there is no evidence to explain why Plaintiff would quit his job.

Plaintiff claims that Mr. Melendez and Mr. Rivera had worked together previously at a Rite Aid store in the mid-1990s and alleges that Mr. Melendez was behind Family Dollar's hiring of Mr. Rivera by a previous District Manager, Ron Kozak, in 2003. (Melendez Depo. at pp. 109-113.) In February 2003, Mr. Rivera started as an Assistant Manager at the Clark Avenue Family Dollar Store. (*Id.* at p. 111.) In February 2004, Mr. Rivera became an Assistant Manager to Plaintiff at the Detroit Road Family Dollar Store, but returned to the Clark Avenue store two months later as the Store Manager, until he replaced Plaintiff in November 2004 at the Detroit Road Store. (*Id.* at pp. 106-107.) Mr. Melendez and the Regional Manager, Ron Sheppard, were responsible for his transfer. (*Id.* at p. 117.) Mr. Rivera received several pay increases, which were approved by Mr. Melendez, after being transferred to the Detroit Avenue Store. (*Id.* at pp. 116-119.) Salary increases required approval by the Regional Manager. (Melendez Depo. at p. 124.)

Third, Plaintiff agrees that he cannot maintain a claim for wrongful discharge in violation of Ohio public policy under the FMLA, but asserts that he

can still bring such a claim relative to his race/national origin cause of action.

On December 14, 2006, Defendant filed its Reply Brief in Support of Its Motion for Summary Judgment. (Docket #37.) Defendant reiterates its position that Plaintiff has not presented evidence to support his claims under the FMLA, Title VII or Chapter 4112 of the Ohio Revised Code, and cannot establish a claim for wrongful discharge in violation of the Ohio public policy against national origin discrimination.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to ajudgment as a matter of law." FED. R. CIV. P. 56(c). The burden of showing the absence of any such "genuine issue" rests with the moving party:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis

> for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact.

Celotex v. Catrett, 477 US. 317,323 (1986) (citing FED. R. Cry. P. 56(c)). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 US. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. The court will view the summary judgment motion in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 US. 574, 587 (1986).

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of their case. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937,941 (6th Cir. 1995) (citing *Celotex*, 477 US. at 322). Accordingly, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be

insufficient; there must be evidence on which the jury could reasonably find for the plaintiff" *Copeland v. Machulis*, 57 F.3d 476,479 (6th Cir. 1995) (citing *Anderson*, 477 U.S. at 252). Moreover, if the evidence presented is "merely colorable" and not "significantly probative," the court may decide the legal issue and grant summary judgment. *Anderson*, 477 U.S. at 249-50 (citations omitted).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmoving party. The nonmoving party may not simply rely on its pleadings, but must "produce evidence that results in a conflict of material fact to be solved by a jury." *Cox v. Kentucky Dep't of Transp.*, 53 F.3d 146, 149 (6th Cir. 1995). FED. R. CIV. P. 56(e) states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

The Federal Rules identifY the penalty for the lack of such a response by the nonmoving party as an automatic grant of summary judgment, where otherwise appropriate. *Id.*

Though parties must produce evidence in support of and in opposition to a motion for summary judgment, not all types of evidence are permissible. The Sixth Circuit has concurred with the Ninth Circuit that "'it is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment.'" *Wiley v. United States*, 20 F.3d 222, 225-26 (6th Cir. 1994) (quoting *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179,1181 (9th Cir. 1988)). FED. R. CIV. P. 56(e) also has certain, more specific requirements:

> [Rule 56(e)] requires that affidavits used for summary judgment purposes be made on the basis of personal knowledge, set forth admissible evidence, and show that the affiant is competent to testifY. Rule 56(e) further requires the party to attach sworn or certified copies to all documents referred to in the affidavit. Furthermore, hearsay evidence

> cannot be considered on a motion for summary judgment.

Wiley, 20 F.3d at 225-26 (citations omitted). However, evidence not meeting this standard may be considered by the district court unless the opposing party affirmatively raises the issue of the defect.

> If a party fails to object before the district court to the affidavits or evidentiary materials submitted by the other party in support of its position on summary judgment, any objections to the district court's consideration of such materials are deemed to have been waived, and [the Sixth Circuit] will review such objections only to avoid a gross miscarriage of justice.

Id. at 226 (citations omitted).

As a general matter, the district judge considering a motion for summary judgment is to examine "[o]nly disputes over facts that might affect the outcome of the suit under governing law." *Anderson*, 477 U.S. at 248. The court will not consider non-material facts, nor will it weigh

material evidence to determine the truth of the matter. *Id.* at 249. The judge's sole function is to determine whether there is a genuine factual issue for trial; this does not exist unless "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.*

In sum, proper summary judgment analysis entails "the threshold inquiry of determining whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250.

DISCUSSION

A. Family and Medical Leave Act.

In his First Cause of Action, Plaintiff alleges that he was terminated in violation of the Family Medical Leave Act. Plaintiff claims that his approved, one week absence to care for his mother was covered by the FMLA and, therefore, that he was entitled to be returned to his position as Store Manager once he had returned. Plaintiff

claims that he gave proper notice for purposes of the FMLA that he was taking leave to care for his mother who suffered from a "serious health condition." Plaintiff contends that there is a causal connection between his leave and his termination.

This Court applies the burden shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to retaliation claims under the FMLA. *See Skrjanc v. Great Lakes Power Serv. Co.*, 272 F.3d 309, 313-16 (6th Cir. 2001) (applying the burden-shifting analysis to an FMLA-retaliation suit). In order to establish a prima facie case of retaliation for taking FMLA leave, a plaintiff must show that (1) he was engaged in an activity protected by the FMLA; (2) the employer knew that he was exercising his rights under the FMLA; (3) after learning of the employee's exercise of FMLA rights, the employer took an employment action adverse to him; and, (4) there was a causal connection between the protected FMLA activity and the adverse employment action. *Arban v. West Publ'g Corp.*, 345 F.3d 390,404 (6th Cir. 2003).

Temporal proximity is insufficient in and of itself to establish causation. *See Nguyen v. City of*

Cleveland, 229 F.3d 559, 567 (6th Cir. 2000) (refusing to find that temporal proximity was sufficient in itself to establish a causal connection, and declining to decide "how much evidence in addition to temporal proximity would be required"); *McNett v. Harden Comm. Fed. Credit Union*, 118 F. App'x 960,965 (6th Cir. 2004) (unpublished) ("[T]he employer's knowledge of the protected activity coupled with an adverse action occurring close in time can create an inference of causation *where the particular circumstances strengthen the inference of causation*.") (emphasis added) (citing *Nguyen*, 229 F.3d at 566).

If a prima facie case is established, the defendant must articulate a legitimate reason for replacing the plaintiff. The burden then shifts to the plaintiff to prove that the stated reason for replacing him is pretextual. *See Joostberns v. United Parcel Servs., Inc.*, 166 Fed. Appx. 783, 792-794 (6th Cir. 2006).

As the basis for his FMLA claim, Plaintiff relies solely upon the fact that his employment with Family Dollar ended the day after he returned from caring for his mother. However, in this case, there

are no additional circumstances that can be identified by the Court which strengthen the inference that Plaintiff's termination resulted from taking FMLA leave. Even if the Court were to find that Plaintiff had given proper notice under the FMLA regarding his intention to take leave;[3] that Plaintiff's mother's outpatient needle biopsy rose to the level a "serious medical condition" as contemplated under the FMLA;[4] and, that Plaintiff's

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[3]The FMLA does not require an employee to mention the FMLA by name when noti1)ring an employer of FMLA leave. *Brohm v. JH Props., Inc.*, 149 F.3d 517,523 (6th Cir. 1998). Rather, "'the critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee's request to take time off for a serious health condition.'" *Id.* (quoting *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995)).

[4]The FMLA guarantees leave for "serious medical conditions." Plaintiff's mother had an outpatient procedure, and had a follow-up visit a couple of weeks after she had the biopsy. (Plaintiff's Depo. at pp. 104-107.) The Court will not undertake a lengthy examination of whether the biopsy constituted a "serious medical condition" and will assume that it was for purposes of this Memorandum Opinion only, that it was, as Plaintiff's FMLA claim fails for lack of causation. However, the Court has serious

employment was in fact terminated by Defendant, there is no evidence before the Court to support Plaintiff's assertion of a causal connection between his alleged FMLA covered leave and his termination. The only evidence in support of Plaintiff's claim that his was terminated based upon taking FMLA leave is the fact that his employment ended upon returning from his leave. In this case, temporal proximity standing alone is insufficient to establish a causal connection.

The evidence before this Court shows that Plaintiff requested a one-week vacation at the end of October 2004 to care for his mother who was having surgery. (Plaintiff's Depo. at pp. 80-92; Melendez Depo. at p. 57)[5] His mother was having

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doubts as to whether an outpatient needle biopsy with one follow-up visit two weeks later would constitute a "serious medical condition" for purposes of the FMLA.

[5]Plaintiff discussed additional details of the conversation he had with Mr. Melendez at the time he requested the week absence. Plaintiff claims that Mr. Melendez was "cussing" at him like a "freaking maniac" and called him "Sean." Plaintiff does not appear to allege that these other parts of

an outpatient, needle biopsy of a breast lump. (Plaintiff's Depo at pp. 104-105.) Plaintiff's request was approved and he received one week of paid vacation. (*Id*. at pp. 104-105; Melendez Depo. at pp. 57-59.) Upon his return, Plaintiff stated that he learned that his employment was terminated. However, Plaintiff stated during deposition that no one ever told him that he was terminated because he took vacation time. (Plaintiff's Depo. at pp. 154-155.) Aside from attempts to call Mr. Melendez on the moming he was scheduled to return to work, Plaintiff made no attempt to ascertain why his employment ended. Plaintiffhas not established a causal connection between Plaintiff's absence and the termination of his employment.[6]

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the conversation have any bearing on his claims in this lawsuit. Plaintiff claims to have called Human Resources regarding Mr. Melendez's behavior during their conversation, and Mr. Melendez later apologized. (Plaintiff's Depo. at pp. 91-97.)

[6]Plaintiff also discussed an e-mail that he obtained after his employment was terminated regarding a mandatory Store Manager's budget meeting that was scheduled during the week that he was with his mother. (Plaintiff's Depo. at pp. 116-122.) Plaintiff stated during deposition that he was disciplined for

missing the budget meeting. (*Id.* at p. 117.) However, Plaintiff stated that no one ever talked to him about the meeting or the e-mail, and that prior to and during his vacation no one ever told him that he would disciplined for missing the budget meeting. (*Id.* at pp. 117; 127-129.) During deposition, Plaintiff stated that when he returned after his vacation, Jose Rivera and Mariely Capestany told him that he was disciplined for taking the vacation. However, he stated later that Jose Rivera told him only that he needed to contact Juan Melendez regarding his employment with Family Dollar and that he did not talk to Mariely Capestany after returning from his week absence. (*Id.* at pp. 129-142; 151.)

In her statement, Mariely Capestany stated that she spoke to Plaintiff during his absence regarding the budget meeting and told him that he was excused and was not expected to attend. Ms. Capestany also stated that Plaintiff called her on the evening of November 8, 2004, and asked that she have Mr. Melendez call him. (Statement of Mariely Capestany, Defendant's Exhibit A)

Although these facts are in dispute, they are not material to the determination of whether Plaintiff satisfied the elements of a prima facie case of retaliation for taking FMLA protected leave. Plaintiff has not set forth evidence sufficient to raise

The Court recognizes that there is a factual dispute as to the events that transpired on the Sunday before Plaintiff was to return to work. Defendant contends, and Plaintiff denies, that Plaintiff contacted Assistant Store Manager Capestany by phone on Sunday, November 7th 2004 and stated that he would not be returning to work. (Plaintiff's Depo. at pp. 144-145; Melendez Depo. at p. 65.) This serves as the basis for Defendant's assertion that Plaintiff abandoned his job and needed to be replaced, as opposed to Plaintiffs assertion that he was terminated. In reality, based on the deposition testimony offered by both Parties, operations at the Family Dollar store in question seem somewhat disorganized, as were communications between employees and managers. However, this factual dispute is immaterial. Plaintiffhas presented no evidence to support the assertion that he was terminated because he took FMLA leave.

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the inference that he was terminated because of his absence.

Based on the foregoing, there is no evidence upon which a jury could reasonably find in favor of Plaintiff relative to his FMLA claim. Plaintiff has failed to provide sufficient evidence of causation, necessary to sustain his claim. Accordingly, Defendant is entitled to Summary Judgment as a matter of law as to Plaintiff's First Cause of Action.

B. Title VII/Ohio Revised Code Section 4112.

Title VII prohibits employers from discriminating against employees on the basis of race. 42 U.S.C. § 2000e. "It is well established that the burden is on an employment discrimination plaintiff to establish a prima facie case of discrimination." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992) (citations omitted). The Supreme Court of Ohio has held that "federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000e *et seq.*, Title 42, is generally applicable to cases involving alleged violations of OHIO REV. CODE ANN. § 4112." *Plumbers & Steamfitters Commt. v. Ohio Civil Rights Comm.*, 66 Ohio St.2d 192, 196 (1981). Thus, the Court's consideration of federal case law applies equally to Plaintiff's state and federal claims. *See Mitchell*

v. *Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992) (stating that the district court correctly "lumped together" plaintiff's Title VII and Ohio state law theories of discrimination).

Where the plaintiff does not have direct evidence of discrimination, courts use a burden-shifting approach. The Supreme Court explained:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248,252-53 (1981) (citing *McDonnell Douglas*

Corp. v. Green, 411 U.S. 792,802,804 (1973)). To establish a prima facie case of race discrimination under *McDonnell Douglas* and *Burdine*, (1) he is a member of a protected class; (2) he was qualified for the job; (3) he experienced an adverse employment action; and (4) he was replaced by a person outside the protected class or she was treated differently than a similarly situated non-protected employee. *See Newman v. Federal Express Corp.*, 266 F.3d 401,406 (6th Cir. 2001) (citing *Talley v. Bravo Pitino Restaurant*, 61 F.3d 1241, 1246 (6th Cir. 1995)).

In reverse-discrimination cases, in order to establish the first prong of a prima facie case, a plaintiff must demonstrate "background circumstances [to] support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Leadbetter v. Gilley*, 385 F.3d 683, 690 (6th Cir. 2004); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985). To establish such background circumstances, "evidence of [defendant's] unlawful consideration of race as a factor in hiring in the past justifies a suspicion that incidents of capricious discrimination against whites because of

their race may be likely." *Jamison v. Storer*, 830 F.2d 194,1987 WL 44901, at *3 (1987). To satisfy the fourth prong in a reverse-discrimination case, the plaintiff must show that the defendant treated differently employees who were similarly situated but were not members of the protected class. *Id.*

In this case Plaintiff has not demonstrated the "background circumstances" necessary to support his reverse discrimination claim against Family Dollar. The evidence before the Court illustrates that the District and Region within which Plaintiff worked included managers and other employees who were of various races/national origins, including white/non-Hispanic, African American, Indian, and Hispanic. Although Plaintiff's District Manager, Juan Melendez, was Hispanic, and the person who ultimately filled his position was Hispanic and had known Mr. Melendez previously, this is insufficient to establish a suspicion that Defendant discriminated against white/non-Hispanic employees. Mr. Rivera was working as a Store Manager at a different Family Dollar store and when he was transferred to replace Plaintiff (*Id.* at pp. 115-116.) Previously, Mr. Rivera had

served as an Assistant Manager under Plaintiff at the Detroit Road store. (*Id.*)

Plaintiff stated during his deposition that he has no facts to suggest that his employment was terminated because of his race, white. (Plaintiff's Depo. at p. 156.) Plaintiff stated that neither his manager, nor any other supervisor, made any comments regarding Plaintiff's race or national origin during his employment. (*Id.* at pp. 152-154.) Plaintiff states in his Response to Defendant's Motion for Summary Judgment that "Mr. Melendez wanted to place a Hispanic in the store which was located in a Hispanic neighborhood and which was staffed by mostly Hispanic sur named employees." While the store may be located in a Hispanic neighborhood and be staffed by Hispanic employees, there is no support for Plaintiff's assertion that Mr. Melendez terminated Plaintiff so that he could place a Hispanic employee in the store.

The Court has reviewed the deposition transcripts of Plaintiff and Mr. Melendez in detail, and finds the following testimony to be relevant to the issue of "background circumstances":

- Plaintiff started as a stock boy on December 23, 2001, with Family Dollar at West 110th and Lorain. His Store Manager was Cheryl Perez. He was a stock boy for six months when he was promoted to an Assistant Manager position at the Painesville Family Dollar Store. Cheryl Perez and Juan Melendez told him that he would be promoted. He worked at approximately five different Family Dollar Stores as an Assistant Manager. He was subsequently approached by Mr. Melendez regarding a promotion and became a Store Manager in December 2002, at the Painesville Family Dollar Store. (Plaintiffs Depo. at pp. 32-42.)

- Plaintiff spent about a year as the Store Manager at the Family Dollar Store in Painesville. The Store Manager before him, "Joanne," a white female, was terminated. Plaintiff subsequently transferred to the Euclid Family Dollar Store after the Store Manager, an

African American female named Penelope, was terminated. Rob Kozak (white male), the District Manager at the time, and Ernie Cunningham (white male), the Assistant District Manager, discussed the transfer with him. (Plaintiff's Depo. at pp. 43-47.) Mr. Melendez served as the District Manager in Erie, Pennsylvania for a short period of time during Plaintiff's employment, but later returned to the District Manager position in Cleveland. During that time, Rob Kozak was the District Manager and Ernie Cunningham was the Assistant District Manager.

- In August 2004, Plaintiff became the Store Manager at a brand new Family Dollar Store at W. 73rd and Euclid. Again, Mr. Kozak, a white male, and Mr. Cunningham, a white male, discussed that transfer with him. (Plaintiff's Depo. at pp. 49-51.)

- Plaintiff was responsible for hiring the complete staff at the Detroit Road location. Plaintiff, with the input of five other store managers, the District Manager Rob Kozak (a white male), and the Assistant District Manager Ernie Cunningham (a white male), made the decisions as to who should be hired. The other Store Managers involved in the decision making process were Cheryl Perez (Plaintiff did not know her race); Daniel Perez (Plaintiff did not know his race); Ron Odee (Plaintiff did not know his race); Clarence (a white male); and, an unnamed Indian woman. (Plaintiff's Depo. at pp. 58-60.)

- Plaintiff objected to hiring Kim Walker (an African American female) and Michelle Valez (a Hispanic female) because he did not feel he could trust them. Plaintiff had considered Janette Hicksman (a white female) and Sheila Golic (an Mrican American female) for the Assistant Store Manager

positions. (Plaintiffs Depo. at pp. 62-63.)

It is of particular relevance to this Court that Plaintiff, in conjunction with the District Manager (a white male); the Assistant District Manager (a white male); and five other Store Managers, including individuals of Hispanic, white/non-Hispanic and Indian origin, made the decisions regarding who would be hired at the Detroit Road Store. Although three of the four Assistant Managers hired were of Hispanic origin, the fourth being African American, they were hired upon the input of seven individuals, three of whom were white including Plaintiff Further, at the directions of Randy Booket, a white District Manager, Plaintiff terminated the employment of a white female employee and a black female employee. Store Managers recommended individuals for promotion to Assistant Manager, and District Managers promoted employees to the position of Store Manager with the approval of the Regional Manager. (Melendez Depo. at pp. 17-18.) The testimony discussed above illustrates that Family Dollar management was composed of individuals of various races, who hired and fired individuals of

various races. Employees of various races were frequently promoted and/or moved between stores.[7] What it does not prove is that Defendant was that unusual employer that discriminates against the majority.

Relative to the time Plaintiff's employment with Defendant ended, Ron Sheppard (a white male) was the Regional Manager. Mr. Melendez (a Hispanic male), as District Manager, was responsible for 23 stores. (*Id.* at p. 8.) Plaintiff stated during deposition that there were other white Store Managers in the District when he was terminated.

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[7]Plaintiff submits a copy of the Detroit Road Store's payroll records, a list which includes many Hispanic sur named employees. However, Plaintiff stated during deposition that he was responsible, at least in part, for hiring the employees at the Detroit Road Store. The Court recognizes that Plaintiff was replaced by Mr. Rivera. As stated above, this fact alone does not establish a prima facie case for reverse discrimination. Further, the payroll list does not provide the Court with any additional evidence that Family Dollar Stores was the type of employer that discriminates against the majority, or that he was treated differently than similarly situated Hispanic employees.

and there were Store Managers who were African American. (Plaintiff's Depo. at pp. 156-57.) Plaintiff stated that there were "maybe two" Hispanic Store Managers in the District when his employment ended, including Jose Rivera his replacement, and a woman named "Seda" who he stated was either Indian or Hispanic. (*Id*. at pp. 157-159.)

Paul Shnepp, the Assistant District Manager under Mr. Melendez, performed most of the store visits for Mr. Melendez and Mr. Melendez had little contact with Plaintiff. (Melendez Depo. at pp. 52; 53-55.) Mr. Melendez stated that he only spoke with Plaintiff as the need arose, and did not speak with him daily or even weekly. (*Id*. at pp. 54-55.) Plaintiff received pay raises, bonuses and promotions during his employment with Defendant. (*Id*. at pp. 42-43.) Mr. Melendez was not responsible for Plaintiff's promotion from Assistant Manager to Manager, nor was he responsible for Plaintiff's transfer between stores. (*Id*. at pp. 19-35.)

The true question in this case appears to arise from the disputed statement of employee Mariely Capestany, to Mr. Melendez, that Plaintiff called the day before he was due to return to work and

told her he would not be returning. Defendants rely upon this alleged statement to Mr. Melendez for the argument that Plaintiff abandoned his job and was thus terminated. Plaintiff claims he never told Ms. Capestany that he did not plan to return and that Defendant's reliance upon the alleged statement is a pretext for discrimination. (Plaintiff's Depo. at pp. 144-45.)

The deposition testimony before this Court illustrates that the operations at Plaintiff's store were unorganized and communication between the staff and managers at all levels was inconsistent. From the deposition testimony submitted by both Parties, it does not appear that Mr. Melendez was overly involved with individual store operations or details on a day to day basis. Regardless, these facts are immaterial as Plaintiff has made no showing of the background circumstances necessary to establish a prima facie case of reverse discrimination. Further, it troubles the Court aside from a couple of unreturned phone calls to Mr. Melendez, it does not appear that Plaintiff attempted to ascertain why his employment with Family Dollar ended prior to filing this lawsuit. (Plaintiff's Depo. at pp. 130-151.) He attempted to

contact Mr. Melendez early on the day that he alleges he tried to return to work, but never made any efforts beyond that to determine his status at Family Dollar or his future employment. (*Id.*)[8] Plaintiff never contacted the Assistant District Manager, nor did he contact anyone in the Human Resources Department.

In addition to the above, the Court finds that it is important to note that whether or not Mr. Melendez had a previous working relationship and/or friendship with Mr. Rivera which precipitated his transfer to the Detroit Road store replace Plaintiff does not establish that Defendant was in any way an employer that discriminates against the majority, or that Plaintiff's employment with Family Dollar ended because he is white/non-Hispanic.

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[8]Although Ms. Capestany's statement relates that Plaintiff called her on the evening of November 8, 2004 and asked that she have Mr. Melendez call him, Plaintiff's testimony does not include this conversation.

Based on the foregoing, there are no material issues of fact as to Plaintiff's claim that he was discriminated against on the basis that he is white/non-Hispanic. Accordingly, Defendant is entitled to Plaintiff's Second Cause of Action alleging reverse discrimination in violation of Title VII; and Plaintiff's Third Cause of Action alleging reverse discrimination in violation of Chapter 4112 of the Ohio Revised Code.

III. Wrongful Termination.

In Count III of his Complaint, Plaintiff argues that he was wrongfully terminated in violation of Ohio public policy. Generally, in order to succeed on a wrongful discharge claim in violation of public policy under Ohio law, a plaintiff must show that (1) a "clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law"; (2) that "dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy"; (3) "the plaintiff's dismissal was motivated by conduct related to the public policy"; and, (4) "the employer lacked overriding legitimate business justification for the

dismissal." *Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299 (6th Cir. 2000), cert. denied, 533 U.S. 951 (2001) (quoting *Painter v. Graley*, 70 Ohio S1. 3d 377,639 N.E.2d 51,57 n.8 (Ohio 1994)). The clarity and jeopardy elements are questions of law to be determined by the court. *Collins v. Rizkana*, 73 Ohio S1. 3d 65, 70 (1995). Whereas, the jury decides factual issues relating to causation and overriding justification. *Id.*

Plaintiff claims that his termination was unlawfully based on one of two factors, either his asserted FMLA leave or the fact that he was white/non-Hispanic. These two claims serve as the basis for his third claim that he was wrongfully terminated in violation of Ohio public policy. Ohio courts have held that" [a] claim for wrongful discharge in violation of public policy embodied in [a] statute prohibiting discriminatory practices will fail if the underlying discrimination claim fails." *Sosby v. Miller Brewing Co.*, 2006 U.S. App. LEXIS 29194 (6th Cir. 2006) (citing *Desanzo v. Titanium Metals Corp.*, 351 F. Supp. 2d 769, 782-83 (S.D. Ohio

2005) (citations omitted)).[9] As set forth above, Plaintiff failed to provide evidentiary support for his claims sufficient to withstand summary judgment. Further, Plaintiff has not identified any other public

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[9]Plaintiff recognizes that Ohio does not recognize a claim for wrongful discharge in violation of public policy when the cause of action is based on an alleged violation of the FMLA. See *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002 Ohio 3994, 773 N.E.2d 526 (2002). As the Ohio Supreme Court has stated:

> Simply put, there is no need to recognize a common-law action for wrongful discharge if there already exists a statutory remedy that adequately protects society's interests. In that situation, the public policy expressed in the statute would not be jeopardized by the absence of common-law wrongful-discharge action in tort because an aggrieved employee has an alternate means of vindicating his or her statutory rights and thereby discouraging an employer from engaging in the unlawful conduct.

Id. at 244 (citations omitted.)

policy which was violated by his termination. *Knox v. Neaton Auto Prods. Mfg.*, 375 F.3d 451, 460 (6th Cir. 2004) (citing *Cochran v. Columbia Gas of Ohio, Inc.*, 138 Ohio App. 3d 888, 895, 742 N.E.2d 734 (Ohio Ct. App. 2000) (affirming a grant of summary judgment against appellant, where the court had determined that appellant failed to establish grounds for relief under RC. § 4112.02 and did not identify any other source of "clear public policy" to sustain a wrongful discharge claim)). Accordingly, there is no basis by which this Court can find that Plaintiff's termination was in violation of Ohio public policy. Defendant is entitled to summary judgment on Count III of Plaintiff's Complaint as a matter of law.

CONCLUSION

Based on the foregoing, Defendant, Family Dollar Store is entitled to summary judgment as a matter of law. Accordingly, Defendant's Motion for Summary Judgment (Docket #28) is hereby GRANTED.

IT IS SO ORDERED.

s/Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: March 20, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBIN ALLEN MORRIS, CASE NO. 1:05 CV 2211

Plaintiff,

v. JUDGE DONALD C. NUGENT

FAMILY DOLLAR STORES OF OHIO, INC.,

Defendant.

ORDER

As set forth in the attached Memorandum Opinion, there are no genuine issues of material fact and Defendant, Family Dollar Stores of Ohio, Inc., is entitled to summary judgment as a matter of law on all of Plaintiff's claims. Accordingly, Defendant's Motion for Summary Judgment (Docket #28) is hereby GRANTED.

IT IS SO ORDERED.

s/Donald C. Nugent
DONALD C. NUGENT
United States District Judge

DATED: March 20, 2007